

66046-2

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No. 66046-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DARRON VAN DOWNEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Gregory Canova

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Darron Downey was accused of assaulting his live-in girlfriend, Diane Brooks. Ms. Brooks did not testify at trial. Her statements to the police and to another witness were admitted over Mr. Downey's confrontation objection. On appeal, Mr. Downey asserts his constitutionally protected right to confrontation was violated by the admission of Ms. Brooks' testimonial hearsay statements, which requires reversal of his conviction and remand for a new trial.

B. ASSIGNMENTS OF ERROR

1. The trial court's admission of Ms. Brooks' testimonial statements to the police violated Mr. Downey's constitutionally protected right to confrontation.

2. Mr. Downey's attorney rendered constitutionally deficient representation when he stipulated to the admission at trial of Ms. Brooks' testimonial statements to Peggy Collins.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment guarantees a defendant the right to confront and cross-examine the witnesses against them. Admission of testimonial hearsay by an unavailable witness violates the defendant's right to confrontation where he has had no prior

opportunity to cross-examine the witness. The trial court admitted the alleged victim's statements to a police officer that she had been assaulted by Mr. Downey where any emergency was over and the statements were about "what happened" as opposed to "what is happening." The alleged victim did not testify at trial. Did admission of the statements violate Mr. Downey's right to confrontation requiring reversal of his conviction and remand for a new trial?

2. A defendant has a Sixth Amendment and article I, section 22 right to counsel and to the effective representation of counsel. A defendant who is denied the effective assistance of counsel and is prejudiced by that failure at sentencing is entitled to a new trial. Mr. Downey's attorney stipulated to the admission of the non-testifying alleged victim's statements to a witness that Mr. Downey had assaulted her despite the fact these hearsay statements were testimonial. Was Mr. Downey prejudiced by his attorney's deficient representation thus requiring reversal of his conviction and remand for a new trial?

D. STATEMENT OF THE CASE

Darron Downey resided at the Wintona Apartments in Seattle. RP 145-46. On April 2, 2010, Mr. Downey's apparent live-in partner, Diane Brooks, came to the apartment manager, Peggy Collins' office with a lacerated forehead and claimed Mr. Downey had assaulted her. RP 147. Ms. Collins called 911 and reported the allegation. RP 147.

Seattle Police officers Ian Birk and William Collins responded to the 911 call. RP 77-80, 103-05. As Officer Birk entered the apartment's main entrance, Mr. Downey called out to him saying that the Seattle Police were probably looking for him. RP 105. Officer Birk detained Mr. Downey and questioned him. RP 106.

Officer Collins contacted Ms. Brooks in Ms. Collins' office. RP 81. Ms. Brooks related to Officer Collins that Mr. Downey had assaulted her and had assaulted her in the past as well. RP 84. Ms. Brooks related she and Mr. Downey were in a long-term romantic relationship. RP 87. On that day, Ms. Brooks claimed Mr. Downey had been drinking for approximately 12 hours and on this occasion, had assaulted her by pushing her forehead onto a window frame causing the gash on her forehead. RP 87-88.

Seattle Fire Department firefighter Eric Lane also responded to the 911 call. RP 134-36. Ms. Brooks related to him that the injury resulted from her boyfriend Mr. Downey, hitting her. RP 137. Based upon Ms. Brooks' statements, the police arrested Mr. Downey. RP 89, 112.

Mr. Downey was charged with assault in the second degree. CP 6.¹ Ms. Brooks did not testify at trial. The State sought to admit her statements to the police as excited utterances, arguing they were not testimonial. RP 58. Mr. Downey objected to the admission of Ms. Brooks' statements on the bases there was no longer an emergency, the statements were thus not testimonial, and their admission violated Mr. Downey's right to confrontation. RP 61-62. The trial court ruled the statements were admissible on the theory they were not testimonial and qualified as excited utterances, relying on the decision in *State v. Ohlson*, 162 Wn.2d 1, 168 P.3d 1273 (2007). RP 69-71.² The State also sought to admit

¹ The State also charged an aggravating factor that the injury was part of a pattern of abuse over a prolonged period of time. CP 6-7. The trial court granted Mr. Downey's motion to dismiss the aggravating factor. RP 206.

² Although the trial court ordered the prosecutor to prepare written findings of fact and conclusions of law following the CrR 3.5 hearing regarding the admissibility of Mr. Downey's as well as Mr. Brooks' statements, no such findings have been entered. RP 72. This Court should remand for entry of the required written findings. See *State v. Head*, 136 Wn.2d 619, 624, 964 P.2d

Ms. Brooks' statements to Ms. Collins on the same basis. RP 12.

Mr. Downey's attorney stipulated to the admission of these statements and stipulated their admission did not violate Mr. Downey's right to confrontation. RP 12.

E. ARGUMENT

1. THE ADMISSION OF DIANE BROOKS' TESTIMONIAL STATEMENTS TO OFFICER COLLINS VIOLATED MR. DOWNEY'S RIGHT TO CONFRONTATION

a. Admission of testimonial hearsay statements of an unavailable witness violates the defendant's right to confrontation.

"Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). "Hearsay is generally inadmissible because the statement is inherently untrustworthy: the declarant may not have been under oath at the time of the statement, his or her credibility cannot be evaluated at trial, and he or she cannot be cross-examined." *United States v. Reilly*, 33 F.3d 1396, 1409 (3d Cir. 1994) (quotation omitted).

The Confrontation Clause of the Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right . . . to

1187 (1998) (remedy for the failure to file required written findings is remand for the entry of the findings).

be confronted with the witnesses against him.” U.S. Const. amend. VI. See also Const. Art I, § 22 (the accused has “the right to . . . meet witnesses against him face to face.”). The Confrontation Clause allows admission of a witness's out-of-court testimonial statements against a criminal defendant if the witness is present at trial for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). If the witness is unavailable, the testimonial statements are admissible only if the defendant had a prior opportunity to cross-examine. *Id.*

In *Crawford*, the Supreme Court “introduced a fundamental re-conception of the Confrontation Clause.” *United States v. Cromer*, 389 F.3d 662, 671 (6th Cir. 2004). *Crawford* held that testimonial, out-of-court statements offered against the accused to establish the truth of the matter asserted may only be admitted where the declarant is unavailable and where the defendant has had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 68. *Crawford*'s holding reaffirmed the importance of the Confrontation Clause, finding that “where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’” *Id.* at 61. Thus,

under *Crawford*, when the prosecution seeks to introduce “testimonial” statements against a criminal defendant, the defendant generally will have a right to confront those witnesses.

This Court reviews confrontation clause violations *de novo*. *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007), *cert. denied*, 553 U.S. 1035, 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008), *overruled on other grounds by Giles v. California*, 554 U.S. 353, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008).

b. The admission of Ms. Brook’s statements to Officer Collins violated Mr. Downey’s right to confrontation.

“Statements taken by officers in the course of investigations are almost always testimonial. So are statements that are the product of police-initiated contact.” *State v. Tyler*, 138 Wn.App. 120, 127, 155 P.3d 1002 (2007) (citation omitted). *See also Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 2273-74, 165 L. Ed. 2d 224 (2006) (holding that a declarant’s statements are testimonial if they relate to a past criminal occurrence relevant to a later criminal prosecution where there is no imminent threat of danger to the declarant).

In the case consolidated with *Davis*, *Hammon v. Indiana*, police responded to a report of domestic disturbance at the home of

Hershel and Amy Hammon. *Davis*, 547 U.S. at 819. One officer spoke with Mr. Hammon while the other spoke with Ms. Hammon. *Id.* The officer who listened to Ms. Hammon's account had her sign an affidavit, in which she wrote that Mr. Hammon had hit and shoved her. *Id.* at 820. Mr. Hammon was charged with domestic battery. Ms. Hammon was subpoenaed, but did not appear at trial. *Id.* Over defense counsel's objection, the trial court admitted the police officer's testimony about Ms. Hammon's statements to him under the excited-utterance exception to the hearsay rule, and admitted Ms. Hammon's affidavit as a present-sense impression. *Id.*

The Supreme Court disagreed and held that Ms. Hammon's statements to the officer and her statements in the affidavit were testimonial because:

There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything. When the officers first arrived, Amy told them that things were fine, and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) "what is happening," but rather "what happened."

Id. at 829-30 (citations omitted).

The facts in *Hammon* virtually mirror the facts in Mr. Downey's matter. Mr. Downey and Ms. Brooks were contacted separately by police following a 911 call regarding a domestic violence incident. There was no longer any emergency, Ms. Brooks was in the apartment manager's office, while Mr. Downey was elsewhere in the building. As in *Hammon*, Officer Collins' questions of Ms. Brooks centered on "what happened" as opposed to "what is happening." *Davis*, 547 U.S. 829-30.

In accord with this analysis is Division Three's decision in *Tyler, supra*. In *Tyler*, a police officer saw Mr. Tyler and a woman apparently fighting. 138 Wn.App. at 124. The officer stopped and told Mr. Tyler to sit on some nearby steps while he contacted the woman. *Id.* The woman related the two were in a domestic relationship, Mr. Tyler had struck her and threatened to kill her. *Id.* During the officer's contact with the woman, the Mr. Tyler shouted something at the woman and the officer. *Id.* Mr. Tyler was arrested and charged with fourth degree assault and intimidating a witness. *Id.* at 125. The woman did not appear and testify at trial. *Id.* Her statements to the police officer were admitted at trial as excited utterances as the trial court found they were not testimonial because they were "preliminary investigative questions at the scene

of a crime shortly after it has occurred[.]” *Id.* Relying on the decision in *Davis, supra*, Division Three reversed, finding the woman’s statements testimonial:

Initially, Ms. Greer appears to have been hesitant to speak with police. It is uncontested that Ms. Greer and Mr. Tyler were stopped so that police could investigate the interaction between them, given the fight observed by the officers. The officers may have thought there was some initial exigency, but that exigency was terminated as soon as law enforcement separated Ms. Greer and Mr. Tyler.

The officers asked Ms. Greer questions about what had previously transpired. Police described this encounter as an investigation, and the State characterized Ms. Greer as a “prospective witness.” RP (Aug. 16-18, 2005) at 120. Taken as a whole, the evidence in this case indicates that Ms. Greer’s statements were testimonial. The trial court erred in admitting these statements.

Tyler, 138 Wn.App. at 127-28. *Accord State v. Koslowski*, 166 Wn.2d 409, 430-31, 209 P.3d 479 (2009). (victim’s answers to police questioning about defendant’s assault and robbery testimonial even where defendant still at large and not apprehended for several days).

Considering all the *Davis* factors and the rest of the analysis in *Davis*, which expressly addresses statements by a victim during interrogation by police officers who respond to a report of a crime, one must conclude that Ms. Brooks’ statements were testimonial.

They were made in the course of police interrogation under circumstances objectively indicating that there was no ongoing emergency and the primary purpose of the interrogation was to establish past events potentially relevant to later criminal prosecution. The State did not establish the statements were nontestimonial because it did not establish that the circumstances objectively indicate the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency. Because Ms. Brooks was unavailable to testify and Mr. Downey had no prior opportunity for cross-examination, admitting Officer Collins' testimony about Ms. Brooks' statements at trial violated Mr. Downey's right to confrontation.

The trial court relied on the decision in *Ohlson* in deciding Ms. Brooks' statements were not testimonial. *Ohlson* involved statements made by one victim who claimed the Mr. Ohlson tried to run them down with his car. Police officers arrived after the assault and questioned the victim. The trial court admitted the statements as excited utterances and ruled they were not testimonial. The Supreme Court agreed the statements were not testimonial because the officer's interrogation of the victim was to enable the

police to respond to “an ongoing emergency.” *Ohlson*, 162 Wn.2d at 19.

Ohlson’s continued viability is suspect in light of the same court’s subsequent decision in *Koslowski* where on virtually the same facts, including where the suspect was still at large, the Court found similar statements to be testimonial. *Koslowski*, 166 Wn.2d at 430-31. In addition, the facts of *Ohlson* are similar to the facts in *Hammon* where the United States Supreme Court also found such statements testimonial, and the *Ohlson* Court’s attempt to distinguish *Davis* and *Hammon* was unavailing.

This Court is free to reject the reasoning in *Ohlson* on federal confrontation grounds. “The United States Supreme Court’s interpretation of the United States Constitution is binding on the State of Washington, including its courts, through the supremacy clause.” *State v. Valdez*, 167 Wn.2d 761, 780, 224 P.3d 751 (2009). As a consequence, this Court should follow the decisions in *Davis* and *Koslowski* and find Ms. Brooks’ statements to Officer Collins testimonial.

c. The error in admitting Ms. Brooks' statements to Officer Collins were not harmless. An error admitting hearsay evidence in violation of the Confrontation Clause is presumed prejudicial unless the State can prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). "Under that standard, an error of constitutional magnitude is harmless only if the State can prove beyond a reasonable doubt that the jury would have reached the same result in the absence of the error." *State v. Anderson*, 112 Wn.App. 828, 837, 51 P.3d 179 (2002), *review denied*, 149 Wn.2d 1022 (2003).

Absent Ms. Brooks' statements to the police and Ms. Collins, there was no evidence presented that her injuries were caused by Mr. Downey. Thus, in light of this dearth of evidence, the State cannot prove beyond a reasonable doubt the admission of the testimonial hearsay was harmless.

This Court must reverse Mr. Downey's conviction and remand for a new trial.

2. DEFENSE COUNSEL WAS INEFFECTIVE IN STIPULATING TO THE ADMISSION OF MS. BROOKS' TESTIMONIAL STATEMENTS TO MS. COLLINS WHICH VIOLATED MR DOWNEY'S RIGHT TO CONFRONTATION

a. Mr. Downey had the right to the effective

assistance of counsel. A criminal defendant has a Sixth Amendment and art. I, § 22 right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942). If he does not have funds to hire an attorney, a person accused of a crime has the right to have counsel appointed. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771,

90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S. at 686.

The proper standard for attorney performance is that of reasonably effective assistance. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. When raising an ineffective assistance of counsel claim, the defendant must meet the requirements of a two prong-test:

First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

b. Ms. Brooks' statements to Peggy Collins were testimonial and were inadmissible as violative of Mr. Downey's right to confrontation and counsel's failure to object resulted in constitutionally deficient representation. In *Crawford*, the Court did articulate several formulations of the core class of testimonial statements, which included "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]" *Crawford*, 541 U.S. at 51-52. This test turns on whether a

reasonable person would believe his or her statements would be used at a later trial. *Id.*

Under this test, Ms. Brooks' hearsay statements to Ms. Collins were testimonial and not admissible. Ms. Brooks was claiming to have been assaulted by Mr. Downey, facts that surely would lead a reasonable person to believe her statements would end up being available for use at a later criminal trial where Mr. Downey would be charged with the assault which she had reported. "A reasonable person in the position of the declarant would realize that such information would likely be used in a criminal investigation or prosecution. Accordingly, such a statement should be considered testimonial, and the confrontation right should apply to it." *State v. Powers*, 124 Wn.App. 92, 98-99, 99 P.3d 1262 (2004), quoting Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L.Rev. 1171, 1242-43 (2002). Mr. Downey's attorney was ineffective for stipulating to the admission of Ms. Brook's testimonial statements to Ms. Collins.

c. Mr. Downey was prejudiced by counsel's deficient performance. Under the second prong of the *Strickland* test, the defendant must show only "a reasonable probability" that counsel's deficient performance prejudiced the outcome of the case.

Strickland, 466 U.S. at 693. The defendant “need not show that counsel's deficient performance more likely than not altered the outcome of the case.” *Strickland*, 466 U.S. at 693. A reasonable probability is one sufficient to undermine the confidence in the outcome of the case. *Id.*

Although Ms. Brooks had injuries she claimed were the result of the assault, the only evidence that Mr. Downey was responsible for inflicting the injuries were the hearsay statements of Ms. Brooks. The testimony of Officer Collins regarding what Ms. Brooks had told him was powerful evidence. To further bolster this testimony, there was the corroborating testimony of Ms. Collins about what Ms. Brooks had told her. Without this evidence, there was insufficient evidence that Mr. Downey was responsible for Ms. Brooks' injuries. Ms. Brooks' statements to the firefighter did not have the same impact as this other testimony as it was merely part of the firefighter's effort to aid Ms. Brooks. The admission of Ms. Brooks' hearsay statements to Ms. Collins prejudiced Mr. Downey. Mr. Downey is entitled to reversal of his conviction.

F. CONCLUSION

For the reasons stated, Mr. Downey requests this Court reverse his convictions and remand for a new trial.

DATED this 23rd day of February 2011

Respectfully submitted,



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